United States Court of Appeals

for the

District of Columbia Circuit

TRANSCRIPT OF RECORD

BRIEF FOR APPELLANT EDWARD P. SCOTT, JR.

In The

UNITED STATES COURT OF APPEALS

For The District of Columbia Circuit

EDWARD P. SCOTT, JR.,

Appellant,

v.

UNITED STATES OF AMERICA,

Appellee

No. 19,139

9998

APPEAL FROM THE JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

CYRIL V. SMITH, JR.

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Attorney for Appellant
(Appointed by this Court)

STATEMENT OF QUESTIONS PRESENTED

(1) Was there probable cause for arrest when the arresting officer detained and questioned appellant solely because he was seen in the company of men identified by the police as narcotics addicts, so that evidence seized in the course of search following arrest was legally acquired?

(2) Was a warrantless search of a parked car in which appellant had been sitting, after appellant had been arrested for driving without a valid driver's permit, legal, so that evidence seized in the course of the search was legally acquired?

(3) Should the case be remanded for further hearing to determine whether the Government had any knowledge of information exculpating appellant when, after a Government witness testified that a second man was concerned in the alleged theft, and after appellant identified the man and the arresting officer testified he knew the man identified by appellant, the Government failed to show that it had no knowledge of the identity or whereabouts of the second man, nor any statement of other evidence from him tending to exculpate appellant?

(4) After a Government witness testified that a second man was concerned in the alleged theft, and the Government introduced no evidence concerning the identity

or whereabouts of this man, was it reversible error for Government counsel to ask the jury to assume that the Government had no knowledge of the identity or whereabouts of the second man, and to invite the jury to speculate what the Government would do if it had such information?

(5) After a Government witness had testified that a second man was concerned in the alleged theft, and the Government introduced no evidence concerning the identity or whereabouts of this man, was it reversible error for the court to state to the jury after seven hours of deliberation, when they reported that they were hopelessly deadlocked, that the case would have to be tried again on the same evidence?

(6) Was it reversible error for the court below to fail to admonish the jury not to communicate with anyone when they were separated in the course of their deliberations after the case had been submitted to them?

BRIEF FOR APPELLANT EDWARD P. SCOTT, JR.

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Appellant,

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APPEAL FROM THE JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

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TABLE OF CITATIONS

* Cases principally relied upon.

JURISDICTIONAL STATEMENT

On October 30, 1964, a jury returned a verdict finding appellant guilty on two counts of a three count indictment charging violation of the postal laws. Appellant was sentenced by the Honorable Luther W. Youngdahl on December 18, 1964, to from one (1) to four (4) years on Count One of the indictment, which charged the taking of matter from an authorized mail depository (18 U.S.C. Sec. 1708) and from one (1) to four (4) years on Count Three of the indictment, which charged the unlawful possession of matter known to have been stolen from the mail (18 U.S.C. Sec. 1708), both sentences to run concurrently.

On December 28, 1964, appellant moved the District Court for leave to appeal in forma pauperis, and on January 5, 1965, Judge Youngdahl granted appellant's motion and ordered the preparation of the transcript at Government expense.

The jurisdiction of this Court is based on 28 U.S.C. Sec. 1291.

STATEMENT OF THE CASE

On the afternoon of May 7, 1964, Officer Norman of the Metropolitan Police Department observed a parked car at the Northeast corner of 7th Street and Virginia Avenue, S. E., Washington, D.C. Tr. 54. Standing by the car were two men; two men were in the car; appellant was seated behind the

steering wheel. Tr. 54. Acting upon the suspicion that the two men standing by the car were "known narcotics addicts", Officer Norman stopped to question the group. Tr. 54. In the course of questioning appellant, he elicited the admission that appellant had been driving the car without a valid driver's permit. Tr. 55. Appellant was then placed under arrest and removed from the car. Officer Norman then searched the car and found on the front floor a United States Savings Bond contained in an envelope, and on the back seat a briefcase. Tr. 55-56.

On June 29, 1964, a grand jury returned a three count indictment charging appellant with removing a letter from an authorized mail depository at 2515 14th Street, N. E., Washington, D. C., removing a United States Savings Bond from the envelope stolen from such depository, and having in his possession the bond, knowing it was stolen.

At the trial, Marie Jones testified for the Government that she was at 2515 14th Street, N. E., on the morning of May 7, 1964; that she saw appellant standing in the first floor hallway of the apartment house at that address; and that she saw another man bending over mailboxes with a briefcase near him. Tr. 34-37. Mrs. Jones testified that appellant left the hallway for the street after a few moments. Tr. 36. She testified that a briefcase shown to her that

evening at the police station, seized by Officer Norman after he arrested appellant, was similar to the one she had seen in the hallway. Tr. 40.

The prosecution introduced in evidence two exhibits -- a brown envelope and a United States Savings Bond. This evidence was obtained by Officer Norman during the course of the search described above. The Government introduced evidence tending to show that the bond had been mailed to a person residing at 2515 14th Street, N. E., Washington, D. C.; that it had not been received by such person, that the mailboxes at 2515 14th Street, N. E., were authorized mail depositories, and that they had been tampered with.

Appellant took the stand. He testified that he had picked up a man known to him as "Shaky" to give him a ride to the Southeast section of Washington. Tr. 82. Appellant stopped by his apartment to pick up his son to take him to school, leaving Shaky in the car. He was employed as a messenger; while in the apartment he left a briefcase containing patent drawings which he was to deliver in the car. Tr. 82. Upon returning to the car, he found Shaky and the briefcase gone. Tr. 82. He immediately searched for Shaky and saw him in the apartment house hallway at 2515 14th Street, N. E., in appellant's neighborhood. Tr. 83.

Appellant testified he entered the hallway to retrieve his briefcase. Tr. 83.

Officer Norman testified that he could not recall that appellant had stated anything to him at the time of arrest about "Shaky". Tr. 62. But Officer Norman did know a man called "Shaky"; he knew his real name. Tr. 62. The Government introduced no evidence as to the identity of the man seen stooping over the mail boxes, nor as to whether it had ever sought to find that man or ever obtained any information from him which might tend to exculpate appellant.

Appellant's trial counsel made a motion for judgment of acquittal at the close of the Government's case, which was denied. Tr. 63.

In the course of closing argument to the jury, Government counsel adverted to the issue raised by the absence of any information in the Government's case concerning the man seen stooping over the mailbox, and asked the jury to assume as a fact what was not shown by the record: that the Government had no knowledge of the other man. Tr. 159.

The jury was instructed by the trial court that, if they found appellant guilty on Count One (removing matter from the mails) they might not then consider Count Three (having in possession matter known to be stolen from the mail). But they were further instructed that they might

find appellant guilty as a principal for aiding and abetting the removal of matter from the mail on Count One, and they might then consider Count Three. Tr. 183-185.

The case went to the jury at 2:23 p.m., October 28, 1964. The court indicated to counsel that the jury would be excused if they had not reached a verdict by 10:30 p.m. and allowed to return the next day. Tr. 131. The court, which at the beginning of the case had admonished the jurors not to discuss the case among themselves or with anyone else and had specifically limited this admonition to proceedings during trial, and not to proceedings when the jurors retired to the jury room (Tr. 19-20, 64, 130), failed to admonish the jurors when they were allowed to separate in the midst of their deliberations as to their obligations while they were separated.

On the morning of October 29, 1964, the court, after receiving a note from the jury that they were "hopelessly deadlocked" on Counts One and Three of the indictment, asked the jury to continue deliberations because, "The case will undoubtedly have to be tried again on the first and third counts by the same evidence as was produced before this jury." Tr. 192.

The jury returned a sealed verdict at 2:00 p.m. on October 29, 1964, which was opened in court on October 30, 1964. The verdict found appellant guilty of Counts One

and Three -- therefore finding that appellant did not remove matter from the mail, but that he was guilty as an aider and abetter. And the jury found appellant not guilty on Count Two (removing matter from an envelope stolen from the mail).

CONSTITUTIONAL PROVISIONS INVOLVED

IV Amendment to the Constitution:

> "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

V Amendment to the Constitution:

> ". . . nor shall any person . . . be deprived of life, liberty, or property, without due process of law . . . ."

STATEMENT OF POINTS

1. The admission in evidence of exhibits consisting of a United States Savings Bond and an envelope was reversible error. The testimony of the police officer who seized this evidence shows very clearly that the warrantless search and seizure following the arrest of appellant was illegal, because there was no probable cause for arrest. Even if it were assumed that the arrest of

appellant for driving without a valid driver's license was made with probable cause, the subsequent search and seizure was illegal because unreasonable: it bore no relation to the grounds for the arrest, nor was it necessary to prevent the appellant from escaping, nor to safeguard the arresting officer, nor to seize the fruits or implements of the crime.

2. When the Government's witness testified that another man was seen in proximity to mailboxes from which it was alleged that matter was stolen, and appellant testified as to the man's name, and the arresting officer testified he knew the man, but could not recall whether the appellant had told him the man's name at the time of arrest, the issue was squarely raised whether the Government knew the identity of the second man and had any information from him tending to exculpate appellant. The Government failed to show that it had no such information. If the Government had such information and failed to reveal it to appellant, he was deprived of due process. The case should be remanded to determine whether the Government had any information from the other man concerned tending to exculpate appellant.

In any event the case should be reversed and remanded for a new trial because it was error for Government counsel to ask the jury to assume that the Government had no information concerning or from the other man, and for the trial court to state to the jury, after they reported they were

hopelessly deadlocked, that no new evidence would be produced at a second trial.

3. It was reversible error to fail to admonish the jury when they were allowed to separate in the midst of their deliberation. Prior admonitions by the court were addressed solely to the jurors' conduct during trial and specifically limited to their activity before they retired to the jury room.

SUMMARY OF ARGUMENT

The Fourth Amendment's prohibition against unreasonable searches and seizures is one of the bulwarks of our free society. Material seized in violation of the Fourth Amendment may not be introduced in evidence.

Material produced as evidence by the Government was illegally seized: There was no probable cause for the arrest which preceded the search and seizure of this evidence. The arresting officer testified that he investigated and questioned appellant when he found him seated in a car with another man and two men standing beside the car on the afternoon of May 7, 1964. He testified that he investigated because he suspected the two men standing by the car were narcotics addicts; he did not identify appellant as an addict, nor did he testify that he found any violation of the narcotics laws.

After questioning appellant, the arresting officer elicited appellant's admission that he had driven without a valid driver's license. Appellant was thereupon taken into custody, and the parked car in which appellant had been sitting was searched and the evidence seized. Since the search and seizure were incidental to an arrest without probable cause, the evidence was illegally seized and inadmissible.

Even if the arrest of appellant was valid, the subsequent search of the car and seizure of the documents admitted in evidence at the trial was illegal. The power of the police to search and to seize evidence incidental to an arrest is not unlimited. A contemporaneous search may be made for weapons which might be used against the police officer or for the fruits or implements of the crime. But no such elements were involved here. The arrest was for a traffic violation; the search of the car following the arrest was unreasonable. For this reason, the evidence was illegally seized and inadmissible.

The second argument on this appeal concerns the prejudice to appellant's rights resulting after it became clear at the trial from the Government's own witness that a second man was seen stooping near the mailbox from which matter was alleged to have been stolen. Appellant testified

that he had entered the apartment house hallway where the mailboxes in question were located to retrieve his briefcase which he said the second man had taken from him. Thus, a crucial point in appellant's defense was the explanation of his presence in the hallway. Evidence from this second man might tend to confirm appellant's testimony.

Appellant testified to the identity of the second man, and the arresting officer testified he knew the man, but did not recall that the appellant had told him the other man's name when appellant was arrested. Thus appellant made a showing that the Government knew or had reason to know of the identity of the man who he claimed was near the mailbox from which it was alleged matter was stolen. But the Government did not attempt to explain whether it had learned who the second man was or had interviewed or questioned this man or had obtained any information tending to exculpate the appellant. If the Government had any knowledge of exculpatory evidence, appellant was denied due process if it was not revealed to him.

There were two instances of reversible error after it was clear that a second man had been in proximity to the mailboxes in question. First, while the Government never showed whether it knew the identity of this second man, or had any information from him, Government counsel

asked the jury to assume that the Government did not know the identity of this second man and to speculate what the Government would have done had it known his identity. Second, after the case had been put to the jury, the jury returned after lengthy deliberation and reported to the trial court that it was hopelessly deadlocked. The court asked the jurors to resume their deliberation and told them that no additional evidence would be produced at a second trial. But if the jury had been unable to agree, the Government might well have concluded that it simply did not have sufficient evidence to go to trial, or it might, if it did not know it at the time of the first trial, have learned the identity of the other man and produced him for the second trial. The other man's testimony might have confirmed appellant's testimony.

The third argument on this appeal is that it was reversible error for the trial court to fail to admonish the jury when they were allowed to separate in the midst of their deliberations. The trial court here admonished the jury when it was allowed to separate during the course of the trial, but such admonition was specifically limited to their conduct prior to coming to the jury room. The rule has been clearly established by this Court that the jury must be admonished every time it is separated, and it is reversible error to fail to do so.

ARGUMENT

I. THE EXHIBITS INTRODUCED BY THE GOVERNMENT WERE OBTAINED IN THE COURSE OF AN ILLEGAL SEARCH; THEIR ADMISSION IN EVIDENCE WAS REVERSIBLE ERROR.

With respect to Point I, appellant desires the Court to read Reporter's Transcript pages 28-33, 53-57, and 115-117.

The circumstances surrounding the search and seizure by Officer Norman of an envelope and a United States Savings Bond show very clearly that such evidence was obtained in the course of an illegal search and seizure.

The admission of such evidence is plainly reversible error. While no objection was made below to such admission, this Court should, because of the plain error in allowing admission, require reversal. Rule 52(b) of the Federal Rules of Criminal Procedure; cf. Smith v. United States, ____ U.S. App. D.C. ____ , 335 F.2d 270 (D.C. Cir. 1964).

In brief, Officer Norman testified that, while cruising in a scout car, he saw appellant sitting in a parked car with two other persons standing about the car. Officer Norman testified that he identified the two standing persons as "known narcotics addicts". Tr. 54.

He stopped his car and began to question the men. He asked appellant, who was sitting behind the steering wheel of the parked car, for his driver's permit. Appellant produced the permit of one Marvin Wingfield, his brother-in-law, who was sitting next to him. Tr. 54. Under questioning, appellant admitted he had no valid driver's permit. Tr. 54-55. Officer Norman then placed appellant under arrest for driving without a valid permit. After appellant was removed from the car, Officer Norman searched the car's interior and seized the envelope and bond noted above, as well as a briefcase. Tr. 55-56.

This account -- an account given by Officer Norman himself -- shows very clearly that there was no probable cause for the arrest. The evidence flowing from that arrest was therefore illegally obtained and inadmissible. Even if the arrest were valid, the attendant search and seizure, which bore no relation to the arrest of appellant, was contrary to the Fourth Amendment, and the evidence obtained thereby was inadmissible.

There Was No Probable Cause for Arrest.

Officer Norman's suspicions were aroused when he saw a car parked on the street on the afternoon of May 7, 1964. Two men were in the car, two outside talking to the men within. Officer Norman testified that he believed the two

standing men to be "known narcotics addicts", on whom he had previously made "vagrancy observations", and that he therefore stopped to get "identification". But there is no evidence who the men were, or whether they indeed had any record as narcotics violators. These were the circumstances which led Officer Norman to detain and question appellant. Presumably Officer Norman thought there was probable cause for arrest under D.C. Code Sec. 33-416a (1961) (establishing the offense of being a narcotic drug user "vagrant"). But Officer Norman did not testify that he found any violation of D.C. Code Sec. 33-416a (1961). And while there may have been probable cause to detain and question the men he identified as known narcotics violators, see Freeman v. United States, 116 U.S. App. D.C. 213, 322 F.2d 426 (D.C. Cir. 1963), there was no probable cause to detain and question appellant. Green v. United States, 104 U.S. App. D.C. 23, 259 F.2d 180 (D.C. Cir. 1958) established very clearly that there is no probable cause to arrest or search a person merely found in the company of a known addict.

> "Had he [appellant] remained standing where he was first accosted [in the company of a known addict], or had he merely refused to talk, the police would have lacked probable cause either to arrest him or to search him." 104 U.S. App. D.C. at 25, 259 F.2d at 182.

Officer Norman, however, began questioning appellant concerning possible traffic violations. In the course of this questioning, appellant stated he had been driving while his permit was revoked. Thus Officer Norman finally learned of a violation of law. The violation bore not the remotest relation to the circumstances which had first led Officer Norman to stop and investigate the known narcotics addicts. Of course circumstances developing after arrest cannot constitute probable cause for the arrest. United States v. Di Re, 332 U.S. 581, 595 (1948). And after this arrest, Officer Norman searched the car and seized the material later admitted in evidence.

It follows that, since the arrest was without probable cause, it was invalid, and the evidence obtained in the search incidental thereto is inadmissible. Henry v. United States, 361 U.S. 98 (1959).

The Search and Seizure Was Illegal Even If The Arrest Was Valid. Assuming arguendo that Officer Norman acted properly in arresting appellant for a traffic violation, the subsequent warrantless search of the car was illegal. There was absolutely no basis for Officer Norman to search the car after appellant was removed from it. It has been clearly established at least since Weeks v. United States, 232 U.S. 383 (1914), that there are

limits on searches and seizures incidental to an arrest. The Supreme Court clearly defined these limits in the recent case of Preston v. United States, 376 U.S. 364 (1964).

> ". . . the police have the right, without a search warrant, to make a contemporaneous search of the person of the accused for weapons or for the fruits of or implements used to commit the crime. [citations omitted]. This right extends . . . to the place where he is arrested. . . . The rule allowing contemporaneous searches is justified, for example, by the need to seize weapons and other things which might be used to assault an officer or effect an escape, as well as by the need to prevent the destruction of evidence of the crime -- things which might easily happen where the weapon or evidence is on the accused's person or under his immediate control." Preston v. United States, 376 U.S. at 367 (emphasis supplied).

Here, there was no possible cause for a search under the rule of Preston. Appellant was already out of the car and in the custody of the police; if there were weapons in the car they would be of no use to him. In any event, this crime, driving with a revoked permit, is not one which would reasonably suggest that weapons would be used. As to the "fruits" of the crime, the "implements" of the crime, there simply were none. There are no fruits of a traffic violation. And while the car was in a sense an "implement" of the crime of driving without a valid permit, it strains credulity to believe that Officer Norman seriously intended to impound it as evidence of the traffic violation.

Here there was no possible need for the search incidental to the arrest. No further evidence could possibly be adduced by a search to strengthen the charge of driving without a valid permit. Yet search -- without a warrant -- Officer Norman did. His search, his seizure of the envelope and bond was unreasonable. It falls athwart the Fourth Amendment prohibition of unreasonable searches and seizures. And of course the evidence resulting from this search is inadmissible. Since the inadmissible evidence -- the Savings Bond and envelope -- constituted a crucial part of the Government's case, its admission is clearly reversible error. This Court should reverse and remand for a new trial.

II. ON THE RECORD AS IT NOW STANDS, THERE IS A SUBSTANTIAL QUESTION WHETHER THE GOVERNMENT HAD EXCULPATORY EVIDENCE FROM A SECOND MAN CONCERNED IN THE ALLEGED THEFT; STATEMENTS BY GOVERNMENT COUNSEL AND THE TRIAL COURT WITH RESPECT TO THE GOVERNMENT'S EVIDENCE ON THIS POINT CONSTITUTED REVERSIBLE ERROR.

With respect to Point II, appellant desires the Court to read Reporter's Transcript pages 34-39, 59-62, 81-83, 128, 159, 161 and 192.

A. The State of the Record Is Such That There Should Be a Further Hearing to Determine Whether the Government Had Information Tending to Exculpate Appellant.

Marie Jones testified for the Government that she saw appellant in the vestibule of an apartment at 2515 14th Street, Northeast, Washington, D. C., but that another man was also present and that this second man was close to or leaning over the mailboxes which were later found to be damaged. Tr. 36-37. Appellant admitted his presence in the hallway, but testified he had entered the hallway to retrieve his briefcase from this man, whom he identified as "Shaky". Tr. 82-83. Thus a statement from the second man would have been crucial in establishing appellant's innocence, since the second man was the sole person who could corroborate appellant's testimony as to the reason for his presence in the hallway.

Officer Norman testified that he could not recall that the appellant had not told him at the time of arrest that the second man's name was Shaky. Tr. 59, 61-62. But Officer Norman knew of a man named Shaky. Indeed, he volunteered upon cross-examination that he knew the man's actual name. Tr. 62.

At no time did the Government attempt to explain (a) whether Officer Norman had learned who the second man was; (b) whether the police officer or other law enforcement official responsible for investigation of the mail theft (there was no suggestion by the Government that Officer Norman, who held the rank of private, was in charge of the investigation) had learned who the second man was; (c) whether the police had interviewed or otherwise questioned this man; and (d) whether the police had obtained any information tending to exculpate the appellant. There was thus left open a substantial question whether the prosecutor or the police knew or had reason to know of evidence which might tend to exculpate appellant. If the police had such information or if the prosecutor failed to bring it forward at trial even in a good faith belief that the information was valueless or legally inadmissible or not relevant for any other reason, appellant's due process rights were violated. Brady v. Maryland, 373

U.S. 83 (1963); Ellis v. United States, ____U.S. App. D.C. _____, _____F.2d _____(D.C. Cir. No. 18424, Feb. 25, 1965). See also: Note, Prosecutor's Constitutional Duty To Reveal Evidence To The Defendant, 74 Yale L.J. 136 (1964).

So far as the record shows appellant did not know Shaky's real name nor where to find him. Appellant testified that he knew Shaky only by sight when he saw him in the street. Tr. 92. The possibility that appellant might have been able to track down Shaky is rather remote; the advantages of the Government far outweigh those of the defendant in criminal proceedings, particularly where the question is one of investigation.

For these reasons, the case should be remanded to the District Court to determine whether the Government had any evidence tending to exculpate appellant. 28 U.S.C. Sec. 2106; See Ellis v. United States, supra.

B. Statements by Government Counsel and the Trial Court With Respect to the Government's Knowledge of the Identity of the Second Man Were Plainly Prejudicial to Appellant.

Appellant was prejudiced by the Government counsel's statement with respect to the Government's knowledge of Shaky in his closing argument to the jury.

Government counsel stated:

> "Now Shaky, much is made of why the Government didn't bring Shaky here. You will remember the policeman testified he knows a Shaky, he knows his name, but that defendant didn't say anything to him about Shaky. You just consider for a while if we knew who the other person was, consider if we knew his name, just consider what our action would be." Tr. 159.

This statement was prejudicial to appellant because in it Government counsel asked the jury to assume what the record does not show; that the police did not know the identity of the second man.[1/] All the record shows is that Officer Norman does not recall that he was told by appellant at the time of arrest that Shaky was involved. Coming from Government counsel, such a statement plainly carried great weight. And further, the jury was invited to speculate as to what the Government might do if it did know the identity of the second man. While it is true that the trial court gave the jury a general reminder that statements made by counsel do not constitute evidence (Tr. 161), their attention was not directed to this particularly gross statement bearing on a crucial issue in the case.

Thus the jury was led to believe that the Government

1/ Government counsel apparently had entered the case only at trial. Tr. 128.

had no knowledge of the second man. This issue may well have been crucial in the jury's deliberations; after deliberating the afternoon and evening of October 28th, they reported to the trial court the next day that they were "hopelessly deadlocked" on Counts One and Three. Tr. 192.

The court urged the jury to continue deliberations.

> "The case will undoubtedly have to be tried again on the first and third counts by the same evidence as was produced before this jury." Tr. 192.

The jury returned to its deliberations and some five hours later returned a verdict of guilty.

This statement by the court to the jury was prejudicial to the appellant and constituted reversible error. It was error under the particular circumstances of this case because it assumed that the Government did not know the identity of the second man and would be unable to secure evidence from him. But if the case ended in a mistrial, the Government might well decide that, to complete its case, it needed evidence from the second man. And it might have obtained evidence which tended to exculpate appellant, so that there would be no need of a second trial.

The uncorrected statement made by Government counsel which asked the jury to assume as a fact that the Government did not know of the identity of the second man, and the court's statement to the jury that no additional evidence would be produced at a second trial, each constituted reversible error. They substantially affected the jury's deliberations. This Court should reverse and remand for a new trial.

III. IT WAS REVERSIBLE ERROR TO ALLOW THE JURY TO SEPARATE IN THE COURSE OF ITS DELIBERATIONS WITHOUT ADMONISHING THEM.

With respect to Point III, appellant desires the Court to read Reporter's Transcript pages 19-20, 64 and 130, and the docket entries in this case below for October 28 and 29, 1964, in the Record on Appeal.

The trial court permitted the jury to separate in the midst of its deliberations without admonishing its members not to communicate with anyone concerning the case until they resumed deliberations. This failure is reversible error.

Before considering the failure to admonish the jury upon its separation, it is instructive to consider the admonitions which the court gave to the jury -- admonitions which specifically excluded the jurors' conduct after they began deliberation.

Upon recess following conclusion of the voir dire on October 27, 1964, the court admonished the jury as follows:

> ". . . the Court would like to caution you that during the progress of this trial you should not discuss this case with any person whomsoever, including members of your families. That means that you should not even discuss the evidence among yourselves, trying to

> give each other any impressior. about the evidence as it comes before you during the trial, during recesses or adjournments of the Court, and if anything should appear in press, over radio or television -- I do not now have any information or anticipate that it will -- but should that be the event, you should disregard that as well, and relying solely on the sworn testimony, keeping your minds open, keeping your own counsel until you have heard the arguments of counsel and all the evidence and the instructions of the Court and you come to the jury room for your deliberations." Tr. 19-20.

When the court recessed after hearing testimony on October 27th, the court again admonished the jury.

> "I would like to instruct you once again not to discuss this case with any person until you come to the jury room." Tr. 64.

At the noon recess the next day, October 28th, the court again admonished the jury.

> "I want to caution you once again not to discuss this case with any person until you come to the jury room for your deliberation in this case." Tr. 130

It will be noted that in each case the jurors were admonished only as to their conduct before entering the jury room for deliberation.

On October 28th, as conclusion of the testimony in the case approached, the court informed counsel that

> ". . . I will keep the jury out until 10:30 tonight. If they do not agree on a verdict, I will ask them to return tomorrow morning.

> If they agree, it will be sealed and opened in open court at 10:00 o'clock tomorrow morning." Tr. 131.

The jury was charged on the afternoon of October 28th. The record shows that the jury reached no verdict on the evening of October 28th, and that they were excused to return into court at 10:00 a.m. on October 29, 1964. The record shows no admonition made to the jury when it was allowed to separate on October 28th.

This Court has made clear that if a jury is allowed to separate in a criminal case, it must be admonished.

> ". . . in all criminal cases whenever jurors are permitted to separate, the court should invariably admonish them not to communicate with any person or allow any person to communicate with them on any subject connected with the trial, and not to read published accounts of the course of the trial." Brown v. United States, 69 U.S. App. D.C. 96, 97, 99 F.2d 131, 132 (D.C. Cir. 1938) (emphasis supplied).

For example, in Carter v. United States, 102 U.S. App. D.C. 227, 252 F.2d 608 (D.C. Cir. 1957), this court held that it was reversible error to fail to admonish the jury when the court recessed. It made clear that Brown v. United States, supra, imposed a requirement of admonition.

> "The language we then used, 'the court should invariably admonish them', imposed upon the trial courts a requirement." Carter v. United States, 102 U.S. App. D.C. at 231, 252 F.2d at 612.

See also: Schoeneman v. United States, 115 U.S. App. D.C. 110, 317 F.2d 173 (D.C. Cir. 1963); Coppedge v. United States, 106 U.S. App. D.C. 275, 272 F.2d 504 (D.C. Cir. 1959), cert. denied, 368 U.S. 855 (1961).

The failure to admonish upon separation constitutes reversible error. The case should be reversed and remanded to the court below for a new trial.

CONCLUSION

For the foregoing reasons set out in Points I, II. B, and III, appellant submits his conviction should be reversed and the case remanded for a new trial. Such disposition would obviate the need for further hearing as set forth in Point II. A.

Respectfully submitted,

/s/ Cyril V. Smith, Jr.

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Attorney for Appellant
(Appointed by this Court)

March 19, 1965

BRIEF FOR APPELLEE

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 19,139

EDWARD P. SCOTT, JR., APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE

Appeal from the United States District Court for the District of Columbia

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Assistant United States Attorneys.

QUESTIONS PRESENTED

In the opinion of the appellee, the following questions are presented:

1) Was it plain error to admit into evidence, without objection, a stolen envelope and savings bond seized from appellant's car immediately after he had been arrested for committing in the presence of a policeman the misdemeanor of driving without a valid driver's permit?

2) A) Is a remand for a hearing on whether the government knew of exculpatory evidence called for where nothing in the record suggests that the government knew of such evidence?

B) Were the comments of the prosecutor in rebuttal to defense counsel's summation, and of the court when the jury reported a deadlock, proper?

3) Was it plain error affecting substantial rights to permit the jury to separate overnight during its deliberations without an additional admonition not to discuss the case with others, where counsel was aware that this might occur and where no prejudice to appellant is shown?

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TABLE OF CASES

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OTHER REFERENCES

* Cases chiefly relied upon are marked by asterisks.

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 19,139

EDWARD P. SCOTT, JR., APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE

Appeal from the United States District Court for the District of Columbia

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BRIEF FOR APPELLEE

COUNTERSTATEMENT OF THE CASE

Appellant was charged in a three count indictment filed June 29, 1964, with various violations of 18 U.S.C. 1708. The counts charged respectively theft of a letter from an authorized depository for mail matter, theft of a savings bond from that letter, and possession of the aforesaid bond knowing it to have been stolen. After a jury trial in October, 1964, appellant was found guilty on counts one and three and not guilty of count two. By judgment and commitment filed December 21, 1964, he was sentenced to imprisonment for a period of one to four years on each count, the sentences to run concurrently with each other

and with a sentence then being served for parole violation. This appeal followed.

The government presented evidence of the issuance, mailing, and non-receipt of the stolen letter, the sighting of appellant at the pried-up mailbox of the letter's addressee, and the discovery of the stolen letter in appellant's car on the afternoon of the theft.

On May 5, 1964, United States Savings Bond Q 203-6379944 was issued at Bolling Air Force Base to Mr. John A. Stewart or Mrs. Evelyn Stewart, 2515 14th Street, N.E., Apt. 583A, Washington, D.C. 20018. Under normal practice, the bond would then be placed in an envelope, which would be sealed and given to a postal carrier to be delivered to the local postal authorities. (Tr. 26-33.) Government exhibit 1-A was identified as being an envelope especially made for Bolling Air Force Base and used for mailing bonds, and exhibit 1-B was identified as the bond described above (Tr. 30-32). Mr. Stewart testified that although he expected to receive such a bond as exhibit 1-B about May 7, 1964, he had never had either exhibit 1-A or exhibit 1-B in his possession (Tr. 46-49). When he returned home on May 7, he found that his mailbox[1] had been forced open without his authorization (Tr. 49-50).

At about 10:30 a.m. on May 7, 1964, Mrs. Marie Jones, who was at her daughter's home at 2515 14th Street, N.E., heard a screeching and tearing noise, as if someone were carrying something (Tr. 34-36). After listening a bit, she opened the door to the apartment and saw that about 5 or 6 mailboxes had been broken into by bending up their metal doors. Mrs. Jones could see mail in some of the boxes. There were two men in the hall by the mailboxes. One of the men, who was standing, fled out the door. Both at trial and on the evening of May 7 at the

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[1] Postal Inspector Joseph A. Verant testified that the mailboxes at 2515 14th Street, N.E., which he examained on May 7, have been authorized by the Postmaster General as depositories for mail (Tr. 50-51).

police precinct, Mrs. Jones identified the appellant as this man. The other man, who was stooping over a briefcase, asked whether Mrs. Jones wanted "to take an order for some magazines." She said no, and retired into the apartment. (Tr. 36-40.) The apartment door from which Mrs. Jones observed the men is on the first floor, three steps up from the outside entrance to the building, and the mailboxes are immediately to the right as one enters the building (Tr. 35, 41-42).

Later in the day, Private Winston C. Norman, of the Fifth Precinct, Metropolitan Police Department, observed two men on whom he had previously made vagrancy observations and who were known to him as narcotics addicts standing next to a car parked at 7th Street and Virginia Avenue, S.E., talking to its occupants. Stopping to obtain identifications from the addicts and from the persons in the car, Private Norman observed the appellant sitting behind the wheel. When asked for his permit and registration card, the appellant said he was Marvin Wingfield and handed the officer a new D.C. permit in that name. From the photograph on the permit, however, Private Norman saw that in fact the person in the passenger seat, who said he had no identification, was Marvin Wingfield. When confronted with this, appellant admitted he had no valid D.C. driver's permit and that despite this he had just been driving the car. Faced with these admissions, Private Norman immediately placed appellant under arrest for driving after his license had been revoked, and called for transport. (Tr. 53-55.) About five minutes later, when the appellant was getting out of the car to enter the wagon, he was seen by Private Norman attempting to kick a brown manila envelope under the seat of the car. Once appellant was out of the car, the policeman retrived the envelope, which was lying on the floor of the car immediately beneath where appellant had been sitting. The envelope was torn open and contained a United States Savings Bond. (Tr. 55.) Appellant denied any knowledge of the envelope and bond, and suggested to the officer that one of the men standing alongside might

have dropped the envelope in his car (Tr. 58-59). Private Norman identified government exhibits 1-A and 1-B as this envelope and bond, and the exhibits were thereupon received in evidence without objection (Tr. 55-56).

Taking the stand in his own defense, appellant told the following story. On May 7, 1964, after picking up some patent drawings for his employer, he returned to the vicinity of his home at 1339 Saratoga Avenue, N.E., which is around the corner from 2515 14th Street, N.E. (Tr. 98). He met a man whom he knows only as "Shaky", whom he agreed to drive to Southeast. The appellant then left Shaky in the car while he went inside to get his son whom he was to drive to school. Once home, the appellant discovered that his son did not have to attend school that day.[2] When he returned to his car, he found both his briefcase (which contained patent drawings) and Shaky missing. (Tr. 81-82, 92, 95-96.) He ran down 14th Street looking for Shaky and happened to spy him standing in the vestibule at 2515 14th Street[3] (Tr. 83, 96). Appellant went inside the building and said to Shaky, "Man, give me the brief case, there's Government work in here." (Tr. 83). He then took the briefcase from Shaky and left the building (Tr. 83). According to appellant, Mrs. Jones saw him take the briefcase from Shaky and leave (Tr. 83, 110).[4] While denying knowledge of the stolen bond, appellant testified that he had left the building because he "panicked", fearing that his parole[5] would

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[2] Appellant's testimony regarding his visit home was corroborated by his wife (Tr. 77-79).

[3] On direct examination appellant testified that he noticed Shaky standing by mailboxes (Tr. 83). On cross-examination, however, he testified to the contrary (Tr. 107).

[4] Although appellant testified that Mrs. Jones saw him take the briefcase, he also said that he was walking *out* of the building when she opened her door (Tr. 110). Presumably he would have taken his briefcase from Shaky before starting to leave, since this was allegedly his reason for being in the building. Mrs. Jones testified that appellant did *not* take the case from his companion (Tr. 37).

[5] Appellant admitted a conviction in 1961 for the purchase, sale, dispensing and distribution of narcotic drugs (Tr. 94).

be revoked if he "get into trouble with [Shaky] or anything" (Tr. 83-84, 92-93). Although claiming to be unaware of precisely what Shaky was doing in the building, appellant admitted that he knew Shaky did not live there and "had no business in there" and that Shaky was "doing something" in the building (Tr. 84, 107).

After leaving 2515 14th Street, appellant claimed, he walked down the street to his car. He entered the car on the driver's side and threw his closed briefcase (actually an attache case) into the back seat. (Tr. 112-14.) Shaky then came up and appellant drove him to Southeast (Tr. 83, 111).[6]

Appellant denied any knowledge of how the stolen envelope and bond found their way into his car, except to suggest that Shaky had been sitting beside him on the way to Southeast (Tr. 83-84, 93, 116-17).[7] Consistently with this intimation that Shaky had dropped the envelope, appellant testified that the envelope had not been directly between his legs but rather had been on the transmission hump between the passenger's and driver's sides of the car (Tr. 116). He also denied having tried to hide the envelope (Tr. 116), and said he had known nothing of its existence until the police discovered it (Tr. 92-93).[8]

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[6] Mrs. Jones took the stand in rebuttal and testified that she had seen the appellant and the other man loitering around the area of 2515 14th Street on two later occasions on May 7, 1964 (Tr. 122-25). In the face of this testimony, appellant testified that he had walked back to his car with Shaky, rather than alone (Tr. 147).

[7] Private Norman, it will be recalled, testified that shortly after his arrest appellant had suggested that perhaps one of the men who had been standing alongside the car had dropped the envelope inside (Tr. 59).

[8] In an attempt to impeach Officer Norman, appellant testified the policeman had stopped him on the street several times after his arrest for the instant offense, to inquire where appellant was going, where he had been, whether he was still working, and what he was doing in the neighborhood. Private Norman searched appellant and examined his arms to see if he was using drugs. Appellant also testified that the officer cursed him and threatened to lock him up if he caught appellant in Southeast (Tr. 85-92, 145).

In rebuttal, Private Norman testified that he had indeed spoken

STATUTES INVOLVED

Title 18, United States Code, Section 1708 provides in pertinent part:

> Whoever steals, takes, or abstracts. . . from or out of any mail, post office, or station thereof, letter box, mail receptacle, or any mail route or other authorized depository for mail matter, . . . any letter, . . . or abstracts or removes from any such letter . . . any article or thing contained therein . . .; or
>
> Whoever . . . unlawfully has in his possession, any letter . . . or any article or thing contained therein, which has been so stolen, taken, embezzled, or abstracted, as herein described, knowing the same to have been stolen, taken, embezzled, or abstracted—
>
> Shall be fined not more than $2,000 or imprisoned not more than five years, or both.

Title 4, District of Columbia Code, Section 140 provides:

> The several members of the police force shall have power and authority to immediately arrest, without warrant, and to take into custody any person who shall commit, or threaten or attempt to commit, in the presence of such member, or within his view, any breach of the peace or offense directly prohibited by Act of Congress, or by any law or ordinance in force in the District, but such member of the police force shall immediately, and without delay, upon such arrest, convey in person such offender before the proper court, that he may be dealt with according to law.

Title 40, District of Columbia Code, Section 301(c) provides:

> (c) Any individual to whom has been issued a permit to operate a motor vehicle shall have such per-

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with appellant three or four times after May 8, in the course of his official duties, since he had observed appellant loitering on the streets in the company of other known narcotic violators (Tr. 137-38, 140). He denied having cursed or threatened to jail appellant (Tr. 137-40).

> mit in his immediate possession at all times when operating a motor vehicle in the District and shall exhibit such permit to any police officer when demand is made therefor. Any individual failing to comply with the provisions of this subdivision shall upon conviction thereof, be fined not less than $2 nor more than $40; *Provided*, That this shall not apply to transient visitors from States in the Union which do not require drivers' permits.

Title 40, District of Columbia Code, Section 301(d) provides:

> (d) No individual shall operate a motor vehicle in the District, except as provided in section 40-303, without first having obtained an operator's permit or a learner's permit issued under the provisions of this chapter. Any individual violating any provision of this subdivision shall, upon conviction thereof, be fined not more than $300 or be imprisoned not more than ninety days.

Title 40, District of Columbia Code, Section 302(d) provides:

> (d) Any individual found guilty of operating a motor vehicle in the District during the period for which his operator's permit is revoked or suspended or for which his right to operate is suspended under this act shall, for each such offense, be fined not less than $100 nor more than $500, or imprisoned not less than 30 days nor more than one year, or both.

SUMMARY OF ARGUMENT

I

In the course of his official duties, Private Winston Norman approached a group of four men, two of whom were known to him as narcotic violators on whom he had previously made vagrancy observations. When asked for his identification, appellant, who was sitting in the driver's seat of an automobile, produced a driver's license that

obviously did not belong to him. When confronted with this, appellant admitted to the officer that he did not have a valid D. C. driver's license and that he had been driving the car around. The policeman thereupon properly arrested appellant, who was committing in his presence the misdemeanor of driving after revocation. The seizure about five minutes later of a stolen envelope and bond which were on the floor of the car was reasonably incident to this arrest. The envelope and bond were therefore properly admitted into evidence without objection, and plain error does not appear.

II

Appellant's defense was that a man known to him only as Shaky had stolen the letter and dropped it in his car. During cross-examination of Private Norman, defense counsel developed information that the officer knew a man named Melvin Lucas, whose nickname was Shaky. The officer testified, however, that appellant had not told him of Shaky or of the facts that he testified to in his defense. Appellant did not testify that he told the officer about Shaky. The record does not show that Melvin Lucas is the same Shaky referred to by appellant or what Lucas would testify to if called. Consequently, nothing in the record hints at the government's possession of any exculpatory evidence, and a remand for a hearing on this issue is not warranted.

In rebuttal to defense counsel's argument asking the jury to infer that Melvin Lucas would support appellant's testimony, government counsel pointed out that there was no proof that Melvin Lucas was the Shaky mentioned by appellant. He also asked the jury to consider what the government would do if it knew the identity of the person who even under appellant's version was a mail thief, implying that this person would be a co-defendant at trial. Both arguments were proper, and certainly do not constitute plain error affecting substantial rights, since neither was objected to at trial. The trial court's comment when

the jury reported a deadlock that the case would "undoubtedly" have to be retried on the same evidence did not ask the jury to assume the government had no knowledge of the missing thief, who could not be called to testify by the government since he would thereby incriminate himself. No objection was made to the charge at trial, and it does not constitute plain error justifying reversal.

III

Defense counsel agreed that a sealed verdict could be accepted from the jury and that the jury would be sent home overnight if it had not reached a verdict by 10:30 p.m. He also knew that the judge would leave the building at 4:15 p.m. If he had felt it necessary that the judge further admonish the jury not to talk with others about the case if they recessed overnight, he should have requested such a charge from the judge at trial. No prejudice to the appellant has been demonstrated and the absence of this further charge does not constitute plain error affecting substantial rights.

ARGUMENT

I. Plain error was not committed when the trial court admitted without objection evidence obtained in a search incident to a lawful arrest

(Tr. 53-56)

Appellant first urges that it was error to admit into evidence government exhibits 1-A and 1-B, the stolen envelope and savings bond, since they were obtained by the police pursuant to an unreasonable search following an illegal arrest. Since no objection was made to the introduction of this evidence (Tr. 56), and there was no pre-trial motion to suppress pursuant to Fed. R. Crim. P. 41(e), appellant is forced to argue that plain error was committed. See Fed. R. Crim. P. 52(b). Following *Segurola* v. *United States*, 275 U.S. 106 (1927) where a motion to strike as illegally seized evidence already ad-

mitted was held too late to preserve the issue, this Court has been loath to find plain error in these circumstances or to remand for a fuller determination of the facts. *E.g.*, *Baxter* v. *United States*, —— U.S. App. D.C. ——, 337 F.2d 547 (1964); *Scott* v. *United States*, 115 U.S. App. D.C. 208, 317 F.2d 908 (1963); *Gray* v. *United States*, 114 U.S. App. D.C. 77, 311 F.2d 126 (1962), *cert. denied*, 374 U.S. 838 (1963); *Johnson* v. *United States*, 110 U.S. App. D.C. 187, 290 F.2d 378 (1961).[9] The very practical reason for requiring objections to evidence as illegally seized to be made in the trial court is to permit the parties to develop the facts relating to the validity of the arrest and search. However, in the instant case it is plain from the existing record that the arrest of appellant was perfectly legal and that the stolen mail was obtained as a reasonable incident to that arrest.

A. *Appellant was properly arrested when he committed a misdemeanor in the presence of Private Norman.*

When in the course of his duties Private Norman observed on the public streets, mingling with others, two known narcotics addicts on whom he had previously made vagrancy observations, he approached them to obtain identifications. If these two men had been found to be narcotic drug users at that time and to be without lawful means of support or employment, the officer could have arrested them for violation of 33 D.C. Code § 416a (narcotic vagrancy). Private Norman had a right to ask these men and their companions, appellant and his brother-in-law, for identification, although they could have refused to speak to him. *Green* v. *United States*, 104 U.S. App. D.C. 23, 259 F.2d 180 (1958), *cert. denied*, 359 U.S. 917 (1959). Further, the officer had a right to demand of the operator of the automobile his driver's

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[9] In *Smith* v. *United States*, —— U.S. App. D.C. ——, 335 F.2d 270 (1964), relied on by appellant, there was an objection at trial to the admission of the illegally seized evidence, albeit no pre-trial motion to suppress had been made.

permit. See 40 D.C. Code § 301(c). By merely approaching these four men and asking for identification, Private Norman did not restrict their freedom of movement. Insofar as the record reflects, he did not intend at that moment to arrest them nor could any of the men reasonably have considered themselves under arrest. Consequently, contrary to appellant's assumption, at that point no arrest had yet occurred. See *Henry* v. *United States*, 361 U.S. 98, 103 (1959); *Seals* v. *United States*, 117 U.S. App. D.C. 79, 81, 325 F.2d 1006, 1008 (1963), *cert. denied*, 376 U.S. 964 (1964); *Coleman* v. *United States*, 111 U.S. App. D.C. 210, 218, 295 F.2d 555, 563 (1961), *cert. denied*, 369 U.S. 813 (1962); *Kelley* v. *United States*, 111 U.S. App. D.C. 396, 398, 298 F.2d 310, 312 (1961).

When asked for his driver's permit and registration, appellant offered Private Norman, as his own, a permit that patently did not belong to him. Upon being confronted with the fact that this permit was not his, appellant admitted that he had just been driving the car and that he did not have a valid District of Columbia driver's permit. (Tr. 54-55). It was at this point that he was placed under arrest (Tr. 55). This arrest was eminently proper, since appellant was committing a misdemeanor in the presence of Private Norman.[10]

A police officer may arrest without a warrant when he has probable cause, from his own observations, to believe that a misdemeanor is being committed in his presence. *Garske* v. *United States*, 1 F.2d 620 (8th Cir. 1924); *United States* v. *Rembert*, 284 Fed. 996 (S.D. Tex. 1922); see *Murphy* v. *United States*, 290 F.2d 573 (3d Cir. 1961), *vacated on other grounds*, 369 U.S. 402 (1962); *cf. United States* v. *Viale*, 312 F.2d 595 (2d Cir.), *cert. denied*, 373 U.S. 903 (1963). Probable cause may be provided by admissions of the person arrested. *Rios* v. *United States*, 364 U.S. 253, 262 (1960); *Cunningham* v. *United*

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[10] 4 D.C. Code § 140. Indeed, had he failed to arrest appellant, the officer himself would have been guilty of a crime. 4 D.C. Code § 143.

States, —— U.S. App. D.C. ——, 340 F.2d 787 (1964); *People* v. *Clark*, 9 Ill. 2d 400, 137 N.E.2d 820 (1956) (alternative holding). Private Norman knew that appellant, who was sitting in the driver's seat in actual physical control of the automobile and who had admitted that he was driving it, was the operator of the motor vehicle.[11] Appellant was unable to furnish to the policeman a valid D.C. driver's permit, and had admitted to the officer that he had no valid D.C. driver's permit. These facts demonstrated to Private Norman that appellant was committing in his presence the misdemeanor of operating a motor vehicle after revocation of his driver's permit, in violation of 40 D.C. Code § 302(d), and appellant was thereupon placed under arrest for that offense (Tr. 55).

Alternatively, the record may be read as indicating that appellant told the officer he had never had a D.C. driver's permit, in which case he would have been violating 40 D.C. Code § 301(d), or that appellant said he did not have in his *possession* a valid D.C. permit that had been issued him, in which event he would have been violating 40 D.C. Code § 301(c). Any ambiguity in this regard is the result of appellant's failure to challenge the arrest in the trial court, and he can not complain about it here. See *Gray* v. *United States*, *supra*. Any one of these three interpretations of the testimony would justify the arrest, since the precise nature of the reasoning followed by the arresting officer is immaterial. *Chappell* v. *United States*, D.C. Cir. No. 19324, January 14, 1965, slip op. at 7 n. 5; *Payne* v. *United States*, 111 U.S. App. D.C. 94, 96, 294 F.2d 723, 725, *cert. denied*, 368 U.S. 883 (1961); *Bell* v. *United States*, 102 U.S. App. D.C. 383, 387, 254 F.2d 82, 86, *cert. denied*, 358 U.S. 885 (1958); *Sharpe* v. *Warden*, 225 F. Supp. 738 (D. Md. 1964). The arrest was therefore legal.

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[11] *Jackson* v. *District of Columbia*, 180 A.2d 885 (D.C. Mun. App. 1962); *Perry* v. *District of Columbia*, 162 A.2d 769 (D.C. Mun. App. 1960); *Houston* v. *District of Columbia*, 149 A.2d 790 (D.C. Mun. App. 1959); *cf.* 40 D.C. Code §101(j); 40 D.C. Code § 418(b).

B. *The search of appellant's automobile incident to his arrest was lawful.*

As appellant was leaving the car after his arrest, he was observed by Private Norman attempting to push an object under the seat directly beneath him (Tr. 55). The policeman retrieved the object, which turned out to be a stolen envelope containing a stolen savings bond (Tr. 55). These articles were introduced into evidence as government exhibits 1-A and 1-B (Tr. 55-56).

It is well-established that an officer may, incident to a lawful arrest without a warrant, search the person arrested, the place where the arrest is made, and things under the immediate control of the person arrested, in order to discover weapons, or fruits or instrumentalities of crime. *Preston* v. *United States*, 376 U.S. 364 (1964); *Abel* v. *United States*, 362 U.S. 217 (1960); *United States* v. *Rabinowitz*, 339 U.S. 56 (1950); *Harris* v. *United States*, 331 U.S. 145 (1947); see *Agnello* v. *United States*, 269 U.S. 20, 30 (1925); *Carroll* v. *United States*, 267 U.S. 132, 158 (1925); *Weeks* v. *United States*, 232 U.S. 383, 392 (1914). That the search reveals stolen goods or other contraband unrelated to the crime for which the arrest was made is irrelevant. The contraband may be seized[12] and its possessor prosecuted for the newly-discovered crime. *Harris* v. *United States*, *supra*; *Hutcherson* v. *United States*, D.C. Cir. No. 18375, March 18, 1965; *Johnson* v. *United States*, 110 U.S. App. D.C. 351, 293 F.2d 539 (1961), *cert. denied*, 375 U.S. 888 (1963); *Gendron* v. *United States*, 295 F.2d 897, 902-03 (8th Cir. 1961). The *Gendron* case is remarkably akin to this. There, appellant had not moved below to suppress bonds seized from his car after his arrest for driving without a valid driver's permit, nor had he objected to the bonds' introduction in evidence. The court refused to consider appellant's claim that the admission of the bonds constituted plain error, saying, *inter alia*, that the search was incident to a valid arrest. "Given the valid

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[12] See *Boyd* v. *United States*, 116 U.S. 616, 623-24 (1886).

purpose of search . . ., any other aims the officer may have had are irrelevant. That the valid search disclosed possession of contraband [mail] was appellant's misfortune." *Hutcherson* v. *United States*, *supra*, slip op. at 8 n. 1, Burger, J. concurring.

Appellant argues, however, that there was no need to search the automobile for weapons once appellant had left it, and that there could be no fruits or implements of the crime for which the arrest in this case had been made. Thus, he urges, the search was unreasonable. The short answer to this proposition is *Adams* v. *United States*, —— U.S. App. D.C. —— 336 F.2d 752 (1964), *cert. denied*, 379 U.S. 977 (1965). In that case this Court rejected the argument that a warrantless search of a locked trunk compartment, incident to an arrest, was unreasonable. The Court recognized the logic of the argument that after appellant had left the car under arrest there was no danger that he could destroy evidence in the trunk or obtain a weapon that might lie therein. However, the Court concluded that

> no court has yet held that a car, including its trunk, may not be searched without warrant at the time and place its occupants are placed under lawful arrest. We are not persuaded that we should be the first court to do so. 336 F.2d at 753.

That decision is entirely consistent with the long line of cases cited above that hold that premises in the control of a person arrested may be searched incident to the arrest. Although it might be feasible to obtain a warrant, if the search is otherwise reasonable the fourth amendment does not require one. *United States* v. *Rabinowitz*, *supra*; *Harris* v. *United States*, *supra*. *Preston* v. *United States*, *supra*, relied on by appellant, does not hold to the contrary. In that case the search was unreasonable because *not* incident to the arrest. The Court specifically distinguished the case before it from one where

> either because the arrests were valid or because the police had probable cause to think the car stolen,

the police had the right to search the car when they first came on the scene. 376 U.S. at 367-68.

Since appellant was lawfully arrested for a misdemeanor committed in Private Norman's presence, and since the seizure of the stolen mail was incident to that arrest, there was no error in admitting government exhibits 1-A and 1-B into evidence.

II. Nothing in the record indicates that the government had knowledge of any evidence that might tend to exculpate appellant. No improper statements regarding "Shaky" were made by either court or counsel.

A. *The record does not show that the government was aware of possibly exculpatory evidence.*

Contrary to appellant's contention, the record is devoid of anything to suggest that the government knew the identity of the same "Shaky" referred to by appellant or what that man would testify to if produced in court. The record regarding the government's knowledge of a man nicknamed "Shaky" is so short that it can be quoted in full here. During cross-examination of Private Norman, appellant's counsel inquired

Q. Did he [appellant] say anything about picking up a man known to him as "Shaker" earlier in the day?
A. I don't recall. (Tr. 59.)
. . .
Q. Do you know a man by the name of "Shaker"?
A. I believe you mean "Shaky."
Q. "Shaky"—he [appellant] told you about "Shaky" didn't he?
A. No sir, I know "Shaky."
Q. It is just coincidence that I happen to know the name "Shaky" and you know the name "Shaky" and there wasn't any conversation about picking up "Shaky" and—

[Objection as argumentative sustained.]

Q. Well, you do know a man known to you as "Shaky"?
A. Yes sir. Melvin Lucas is his real name.
Q. And this man mentioned nothing to you about "Shaky"?
A. I don't recall; no sir.
Q. He didn't mention anything about "Shaky" taking his briefcase?

. . .

A. No, sir. (Tr. 61-62.)

If the record disclosed that the government had possessed evidence that might tend to exculpate appellant, reversal might be required. See *Brady* v. *Maryland*, 373 U.S. 83 (1963). If there were the slightest hint in the record that the government might have been aware of such evidence, then a remand for a hearing would be appropriate. See *Ellis* v. *United States*, D.C. Cir. No. 18424, February 25, 1965. However, the record is barren of anything that even remotely tends to indicate that the government knew of any exculpatory evidence and a remand is therefore not warranted.

The record establishes only that Private Norman does know a Melvin Lucas whose nickname is Shaky (Tr. 61-62). This fact in itself does not justify the inference that this man is appellant's Shaky. Even less does it justify the inference that the government knew what this man would testify to if called, or that this Shaky might give evidence corroborative of appellant's story. In the *Ellis* case, *supra*, the defendant testified that police officers had told him of facts that indicated the existence of exculpatory evidence. In the instant case, on the contrary, there is no testimony that any government agent was aware before trial that appellant would claim that Shaky had stolen the letter. Appellant did not so testify, and Private Norman testified to quite the opposite—that appellant had not told him about Shaky (Tr. 59-62). The government therefore had no reason to question Melvin Lucas about this crime, and the record properly does not reflect that it did. Thus there is nothing in the record

from which it can be inferred that the government was aware of exculpatory evidence, and a remand is not called for.[13]

B. *The statements of court and counsel, unobjected to at trial, do not constitute plain error.*

With regard to the allegedly prejudicial statements made by government counsel in summation, it is clear that they were properly made in response to an argument of defense counsel in *his* summation. There is an established rule of evidence that when neither side calls a person who could give relevant testimony and who is not peculiarly within the power of either party to produce, each side may argue to the jury that the missing witness would have testified contrary to the position of its opponent. *United States* v. *Cotter*, 60 F.2d 689 (2d Cir.), *cert. denied*, 287 U.S. 666 (1932). In accordance with this rule, defense counsel argued

> Even the police officer knows more about Shaky than my client does. My client says he don't know where he is. The police officer says he knows his right name. Why don't they have him here? Why didn't they have him here? (Tr. 157.)

This asked the jury to infer that Melvin Lucas, if called, would have corroborated appellant's story. In answer to this, government counsel argued

> Now Shaky, much is made of why the Government didn't bring Shaky here. You will remember the policeman testified he knows a Shaky, he knows his name, but that defendant didn't say anything to him about Shaky. You just consider for a while if we knew who the other person was, consider if we knew his name, just consider what our action would be. (Tr. 159.)

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[13] Appellant testified that he had no idea where Shaky was and had not tried to get in touch with him before trial (Tr. 92).

This argument contains two points. First, counsel pointed out that there was nothing to indicate that Melvin Lucas was the same Shaky referred to by appellant, since appellant had not mentioned Shaky to Private Norman. Second, counsel asked the jury to consider whether, if the government did know who the second man seen by Mrs. Jones had been, that man would have been called as a witness by the government or would, quite the contrary, have been standing trial as a co-defendant. Both arguments were proper. Appellant suggests that this argument asked the jury to assume a fact not in evidence, that is, that the government did not know the identity of the second man involved in the theft. There is nothing in the record to show that the government *did* know his identity. Furthermore, defense counsel did not object to this part of the summation and, as appellant admits, the court charged the jury that closing arguments are not evidence and that it is the jury's recollection of the evidence that governs (Tr. 161). Plain error certainly does not appear. *United States* v. *Socony-Vacuum Oil Co.*, 310 U.S. 150, 238-39 (1940); *Shelton* v. *United States*, 83 U.S. App. D.C. 257, 261-62, 169 F.2d 665, 669-70, *cert. denied*, 335 U.S. 834 (1948); *O'Malley* v. *United States*, 227 F.2d 332 (1st Cir. 1955), *cert. denied*, 350 U.S. 966 (1956).

Finally, appellant complains that a statement made by the court after the jury reported a deadlock on two counts was prejudicial to appellant because it assumed that the government did not know the identity of the second thief and would not call him at a retrial. The full statement made by the court was

> The Court would appreciate it if you would continue deliberations with reference to the first and third counts. The case will undoubtedly have to be tried again on the first and third counts by the same evidence as was produced before this jury.
>
> The Court would hope that you would listen to each other's views carefully and attempt to recon-

> cile them and agree upon a verdict upon the first and third counts. (Tr. 192.)

Although the record does not reflect that the government *did* know the identity of the second man, there certainly is no reason to assume that he could or would have been called to testify in behalf of the government on a retrial. Rather, the logical assumption would be that he would *not* be called by the government. Since even under appellant's version of the facts this man was involved in a theft of mail matter, it is almost certain that he would refuse to testify from a fear of incriminating himself, in the unlikely event that he were not a co-defendant. Thus it was perfectly reasonable for the court to tell the jury that "undoubtedly" no additional evidence would be produced on a new trial. Furthermore, appellant's objection to the supplemental charge comes too late. Fed. R. Crim. P. 30 provides that

> No party may assign as error any portion of the charge or omission therefrom unless he objects thereto before the jury retires to consider its verdict, stating distinctly the matter to which he objects and the grounds of his objection.

The rule obviously is intended to prevent a litigant from taking advantage on appeal of an erroneous instruction that he failed to afford the trial judge an opportunity to correct. Since appellant did not object to these comments of the trial judge when made, he is precluded from arguing them as error on appeal. *Villaroman* v. *United States*, 87 U.S. App. D.C. 240, 184 F.2d 261 (1950).

III. It was not plain error to permit the jury to recess during its deliberations without an admonition not to discuss the case with others, absent any intimation of resulting prejudice.

(Tr. 19-20, 64, 130, 131, 189, 190-92, 195, 197)

Appellant's final contention is that the trial court committed plain reversible error by permitting the jury to

separate overnight during its deliberations without an admonition not to communicate with anyone regarding the case.

At each recess in the trial before the case was submitted to the jury, the court carefully admonished the jurors not to discuss the case with any person until they retired to consider their verdict (Tr. 19-20, 64, 130). When it appeared that the case would go to the jury during the afternoon of the second day of trial, defense counsel acquiesced in the court's suggestion that counsel be excused after 4 p.m. and that the jury be authorized to return a sealed verdict, which would be opened at 10 a.m. the next day. Further, defense counsel agreed that if the jury had not reached a verdict by 10:30 p.m. that night, it would be asked to return the following morning to continue its deliberations. (Tr. 131.) At 3:23 p.m. the jury retired to deliberate (Tr. 189). The court permitted defense counsel to return to his office, and said

> I think I am going to wait until 4:15. If you haven't heard anything by 4:15, you are excused until 10:00 o'clock tomorrow morning. (Tr. 190.)

With the concurrence of counsel, the court thereupon recessed for the day (Tr. 190). The jurors did not reach a verdict that day and at 10:30 p.m., pursuant to the above stipulation, they were excused for the night. At 10:12 a.m. on October 29, the jury announced that it was deadlocked on two counts (Tr. 191-92). After a supplemental charge, the jury retired once more. At 2 p.m. on October 29 it reached a verdict, which was returned in open court on October 30. (Tr. 195, 197.)

As this Court said in *Brown* v. *United States*, 69 App. D.C. 96, 97, 99 F.2d 131, 132 (1938), when during the course of a criminal trial

> jurors are permitted to separate, the court should invariably admonish them not to communicate with any person or allow any person to communicate with them on any subject connected with the trial, and

not to read published accounts of the course of the trial.

The purpose of this admonition is, of course, to assure that the jury's verdict will not be influenced by anything except that which occurs in court and in the jury room. While it may be prudent to repeat the cautionary instruction at every recess of court,[14] the failure to do so does not constitute reversible error in the absence of objection and of any showing of resulting prejudice. In each of the cases relied on by appellant, there was other error requiring reversal and there was a strong likelihood of actual prejudice since the defendant was under indictment for a notorious crime and the trial had achieved newspaper publicity.[15] There is no indication in the record in the instant case that the trial was mentioned in the papers, and the nature of the crime charged is such that it is highly unlikely that it did receive press coverage. Nor is there the slightest suggestion that any juror did in fact discuss the case outside the courthouse. Defense counsel was aware immediately after the jury retired that if no verdict was reached that night, the jury would be excused for the evening by a marshal.[16] If he sensed

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[14] Compare *Finley* v. *United States*, 271 F.2d 777, 780 (5th Cir. 1959), *cert. denied*, 362 U.S. 979 (1960) (claim of error in failure to repeat admonition daily "frivolous") *with Carter* v. *United States*, 102 U.S. App. D.C. 227, 231, 252 F.2d 608, 612 (1957) (*Brown* v. *United States*, *supra*, imposes a "requirement" that jury be admonished at each separation).

[15] *Schoeneman* v. *United States*, 115 U.S. App. D.C. 110, 317 F.2d 173 (1963) (reversed because of erroneous admission of illegally seized evidence); *Coppedge* v. *United States*, 106 U.S. App. D.C. 275, 272 F.2d 504 (1959), *cert. denied*, 368 U.S. 855 (1961) (reversed for insufficient inquiry to determine whether jury had been prejudiced by reading newspaper articles); *Carter* v. *United States*, *supra* (reversed for erroneous admission of statements under *Mallory* rule, and for errors in charge relating to reasonabe doubt, insanity, and nature of counts in indictment).

[16] The Court stated that it would "wait until 4:15" (Tr. 190), implying that it would leave the building thereafter. Appellant's counsel had agreed that a sealed verdict (one subscribed to in the

any danger that the jury might be subject to improper influences if it retired for the night uninstructed not to communicate with others about the case, this was the time to request the court for a supplemental admonition. No such request was made. In the circumstances of this case, therefore, the absence of this admonition can not be urged as plain error affecting substantial rights. *Finley* v. *United States*, *supra*; *People* v. *Burwell*, 279 P.2d 744, 44 Cal. 2d 16, *cert. denied*, 349 U.S. 936 (1955); *People* v. *Small*, 2 App. Div. 2d 935, 156 N.Y.S.2d 415 (3d Dept. 1956), *aff'd*, 3 N.Y. 2d 720, 143 N.E.2d 512, 163 N.Y.S.2d 963 (1957); Fed. R. Crim. P. 52(b).

CONCLUSION

Wherefore, it is respectfully submitted that the judgment of the District Court should be affirmed.

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United States Attorney.

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Assistant United States Attorneys.

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absence of the court) could be returned and that if the jury had not reached a verdict by 10:30 p.m. it would be excused until the next morning (Tr. 131).

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REPLY BRIEF FOR APPELLANT EDWARD P. SCOTT, JR.

In The

UNITED STATES COURT OF APPEALS

For The District of Columbia Circuit

EDWARD P. SCOTT, JR.,

Appellant,

v. No. 19,139

UNITED STATES OF AMERICA,

Appellee

APPEAL FROM THE JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

CYRIL V. SMITH, JR.

701 Union Trust Building
Washington, D. C. 20005

Attorney for Appellant
(Appointed by this Court)

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REPLY BRIEF FOR APPELLANT

Appellant's reply brief will be addressed to appellee's first and third arguments.

The Search and Seizure Were Invalid

The first argument involves the question of admissibility of certain exhibits at the trial. These exhibits were obtained during a search of a parked car in which appellant had been sitting when arrested. Briefly summarized, the circumstances surrounding the search and seizure were as follows: Appellant was sitting in a parked car with another man. There were two men standing near the car. Officer Norman drove by and observed that the two men standing by the car were known to him as narcotics addicts; he accordingly stopped to make vagrancy observations on them. He asked appellant, who was sitting behind the steering wheel, for identification; appellant produced a driver's permit in the name of one Marvin Wingfield and under questioning admitted that his driver's permit had been revoked and that he had been driving the car. Officer Norman then stated that appellant was under arrest for driving with a revoked permit. After removing appellant from the car, Officer Norman searched the interior and seized an envelope with a bond inside; this evidence was later introduced at the trial.

Appellee has argued that first, appellant was not arrested until Officer Norman made a formal declaration that he was under arrest. By casting the time of arrest at this point, appellee attempts to give grounds for some probable cause for arrest, since upon Officer Norman's original approach to the car, his testimony clearly shows that he had no grounds at all to suspect that appellant did not have a valid driver's permit. It was only the admission elicited from the appellant under questioning by Officer Norman that suggested that a traffic violation might be involved. Second, appellee argues that the arrest of appellant without a warrant was justified because a misdemeanor -- operating a motor vehicle without a valid permit -- was being committed in Officer Norman's presence, although Officer Norman's own testimony shows that appellant was not operating the car in his presence. Third, having attempted to establish that the arrest for a traffic violation was valid, appellee argues that the subsequent search of the car in which appellant was sitting was reasonable.

a) <u>Appellant was placed under arrest when Officer Norman initially restricted his freedom of movement</u>. Appellee argues that by merely approaching the car in which appellant was sitting and asking for identification, appellant's freedom of movement was not restricted and that he

was therefore not placed under arrest. (Appellee's Br. p. 11). But the fact of the matter is that appellant's freedom of movement was restricted at that point. The fact that appellant was not in motion when Officer Norman approached the car does not mean that his freedom of movement was not restricted. Normally, stopping of a car constitutes an arrest.

> ". . . the arrest took place when the federal agents stopped the car . . . . When the officers interrupted the two men and restricted their liberty of movement, the arrest . . . was complete." Henry v. United States, 361 U.S. 98, 103 (1959).

It is splitting hairs to argue that approaching a stopped car and asking for identification is any different; in each case the freedom of movement of the person has been restrained; he understands that he is not to depart without permission of the officer. Cf. Kelley v. United States, 111 U.S. App. D.C. 396, 398, 298 F.2d 310, 312 (1961).

It is plainly apparent on the record that when appellant's liberty of movement was first restricted, there was no probable cause for his arrest.

b) Even assuming that arrest was not made until Officer Norman made a formal declaration of arrest, the arrest was invalid. If appellant is viewed as not being placed under arrest until after Officer Norman elicited an admission that he had driven without a valid driver's permit, the arrest was invalid because made without a warrant. Appellee

correctly points out that D.C. Code Sec. 4-140 (1961) gives members of the police force the power to arrest without a warrant any person "who shall commit, or threaten or attempt to commit, in the presence of such member, or within his view, any . . . offense." But having established that, appellee's argument collapses completely. For appellee is driven to arguing that appellant was operating a motor vehicle with a revoked permit in the presence of Officer Norman. How such a misdemeanor was committed in the presence of Officer Norman when his own testimony shows that he first came upon appellant when appellant was seated in a parked car is not shown. Apparently appellee derives some comfort from several decisions holding that it may be properly inferred at trial that a person found seated behind the steering wheel of a car for instance, with the motor running, or immediately after an accident, was operating the car.[1/] But of course those cases can have no possible bearing on whether appellant was operating the car in the presence of Officer Norman.

The record is clear from Officer Norman's own testimony that there was no offense committed in his presence. Having elicited the admission from appellant that

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1/ Jackson v. District of Columbia, 180 A.2d 885 (D.C. Mun. App. 1962); Perry v. District of Columbia, 162 A.2d 769 (D.C. Mun. App. 1960); Houston v. District of Columbia, 149 A.2d 790 (D.C. Mun. App. 1959).

he had driven without a license during the course of the day, the proper course to follow was to obtain a warrant for appellant's arrest for that offense.

c) Even if the arrest for driving without a valid driver's permit were assumed valid, the subsequent search of the car was unreasonable and hence invalid. Appellee contends that there is a far-ranging power incident to an arrest for any crime to search without a warrant for weapons and instrumentalities of that crime. There is no question of a search for weapons in this case. Cf. Hutcherson v. United States, D.C. Cir. No. 18375, March 18, 1965. A search for fruits or implements of crime is limited to cases where the arrest is made for a crime which may have fruits or implements. Agnello v. United States, 269 U.S. 20, 30 (1925). As appellee points out, if a search is initially valid, then anything else turned up in the course of that search is admissible in evidence, as the cases cited by appellee hold. 2/ But appellee makes no showing that there were any fruits or implements of crime connected with the offense of driving without a permit.

2/ Harris v. United States, 331 U.S. 145 (1947); Hutcherson v. United States, D.C. Cir. No. 18375, March 18, 1965; Johnson v. United States, 110 U.S. App. D.C. 351, 293 F.2d 539 (1961), cert. denied, 375 U.S. 888 (1963).

One case -- Gendron v. United States, 295 F.2d 897 (8th Cir. 1961) -- is cited on the grounds that it is "remarkably akin" to this case. In Gendron, the defendant was arrested for a traffic violation. His car was then searched -- but with defendant's consent. 295 F.2d at 902. There is thus no kinship at all between that case and this.

Appellee also contends that Adams v. United States, 118 U.S. App.D.C. 364, 336 F.2d 752, (1964), cert. denied, 379 U.S. 977 (1965) gives a "short answer" to this case. In Adams, police during the early morning hours came upon the scene of a robbery. Shortly thereafter, the police saw defendant getting into a car near the scene of the robbery; they recognized him as one who had fled the scene. They arrested the defendant and searched the car, including the locked trunk. In Adams, therefore, there were strong circumstances suggesting that fruits of a crime might be found in the car. Given those strong circumstances, this Court was naturally hesitant to rule that a search of the car incident to a lawful arrest was not permissible. But the circumstances which compelled that result in Adams are not present here. Here was involved only a minor traffic violation. Authorization of searches here would deprive citizens of substantial areas of freedom. A rule which would permit the police to search each car involved in the many traffic violations occurring each year in the District of Columbia would substantially impair the rights of citizens.

It Was Error To Fail To Admonish The Jury Upon Separation

Appellee's third argument is that it was not reversible error for the court below to fail to charge the jury when they were allowed to separate in the midst of their deliberations that they were not to communicate with anyone concerning the case. The jury was charged and retired on the afternoon of October 28, 1964. At 10:30 on October 28 they were allowed to separate without any admonition, either by the court below or, so far as the record shows, the marshal in charge of them.

Appellee makes an attempt to insinuate that admonitions to juries upon each separation are not required and that raising objection to failure to give such admonition may be frivolous. (Appellee's Br. p. 21, fn. 14). In contrast, it should be pointed out that some courts prohibit the separation of a jury once it has retired for deliberation. United States v. D'Antonio, 7th Cir. No. 14515, February 9, 1965. Appellee however admits, as it must, that the settled rule in the District of Columbia is that there is a requirement that a jury be admonished each time it is separated. Carter v. United States, 102 U.S. App. D.C. 227, 231, 252 F.2d 608, 612 (1957).

There is a mild suggestion that counsel for appellant below agreed that the jury might be separated

without being admonished. Appellee claims that the statement of the court below after the jury retired that it would "wait until 4:15" (Tr. 190) implied that it would leave the building thereafter. But the Court had earlier informed counsel that:

> ". . . I will keep the jury out until 10:30 tonight. If they do not agree on a verdict, I will ask them to return tomorrow morning." Tr. 131.

Defense counsel agreed to this procedure.

Finally, appellee attempts to avoid the failure to admonish the jury by suggesting that the purpose of admonition is merely to keep jurors from reading newspaper accounts of trials and that, since this was a relatively minor offense, there was no likelihood of newspaper publicity. While appellant agrees that this is certainly one function of admonition, there are other equally grave dangers when a jury separates. This is particularly true when they are allowed to separate in the midst of their deliberations. Particularly with a jury such as this, which had great difficulty in reaching its verdict, there may be a temptation for members of the jury to communicate individually with each other while the jury is separated. Such deliberations would appear to be as destructive of the jury's function as reading newspaper accounts of the trial, or discussing the trial with others. All communications about the case

between jury members must be among all members; the views of one member should be tested by the judgment of all.

Appellant should be granted a new trial.

Respectfully submitted,

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May 5, 1965